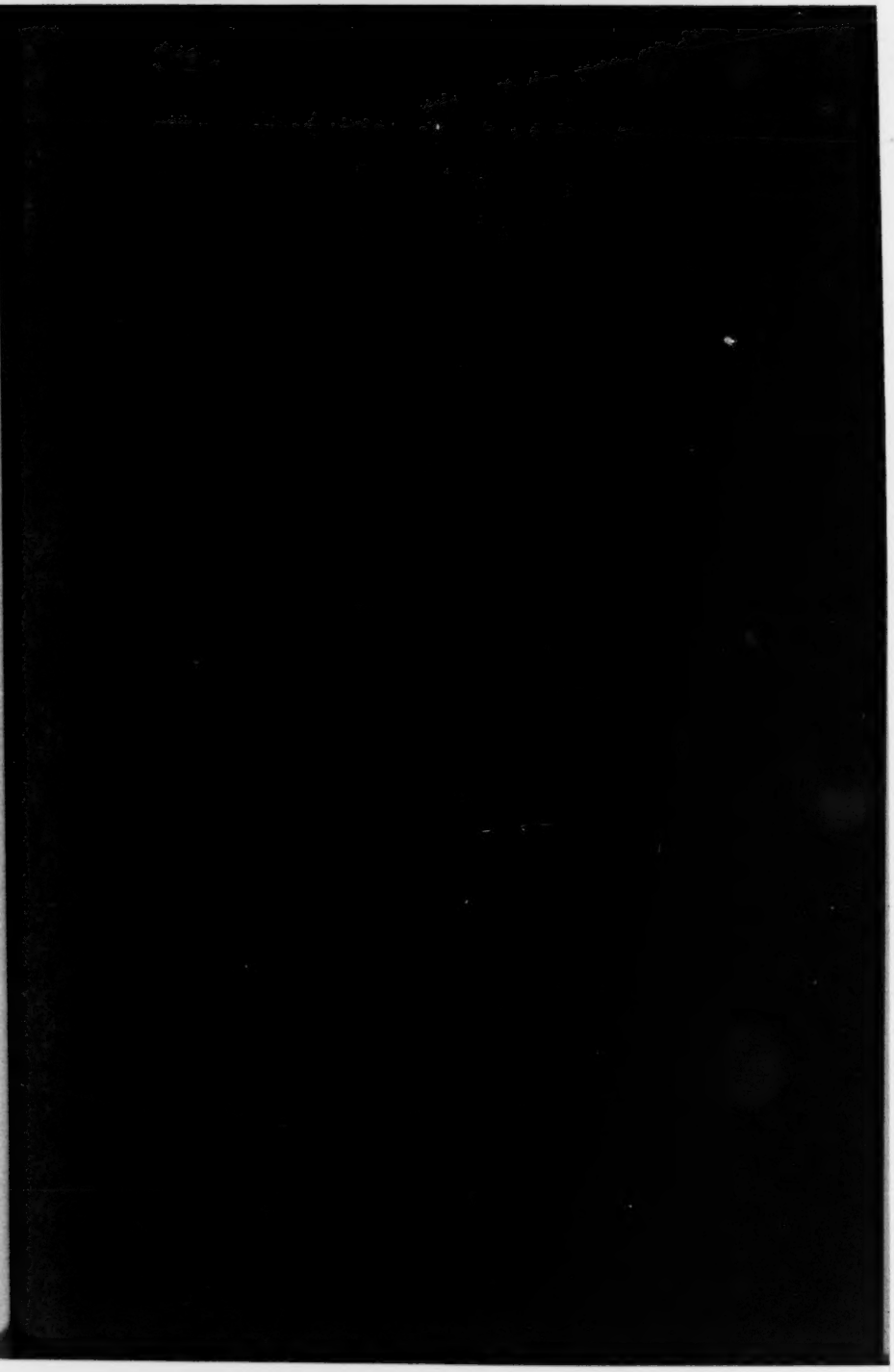

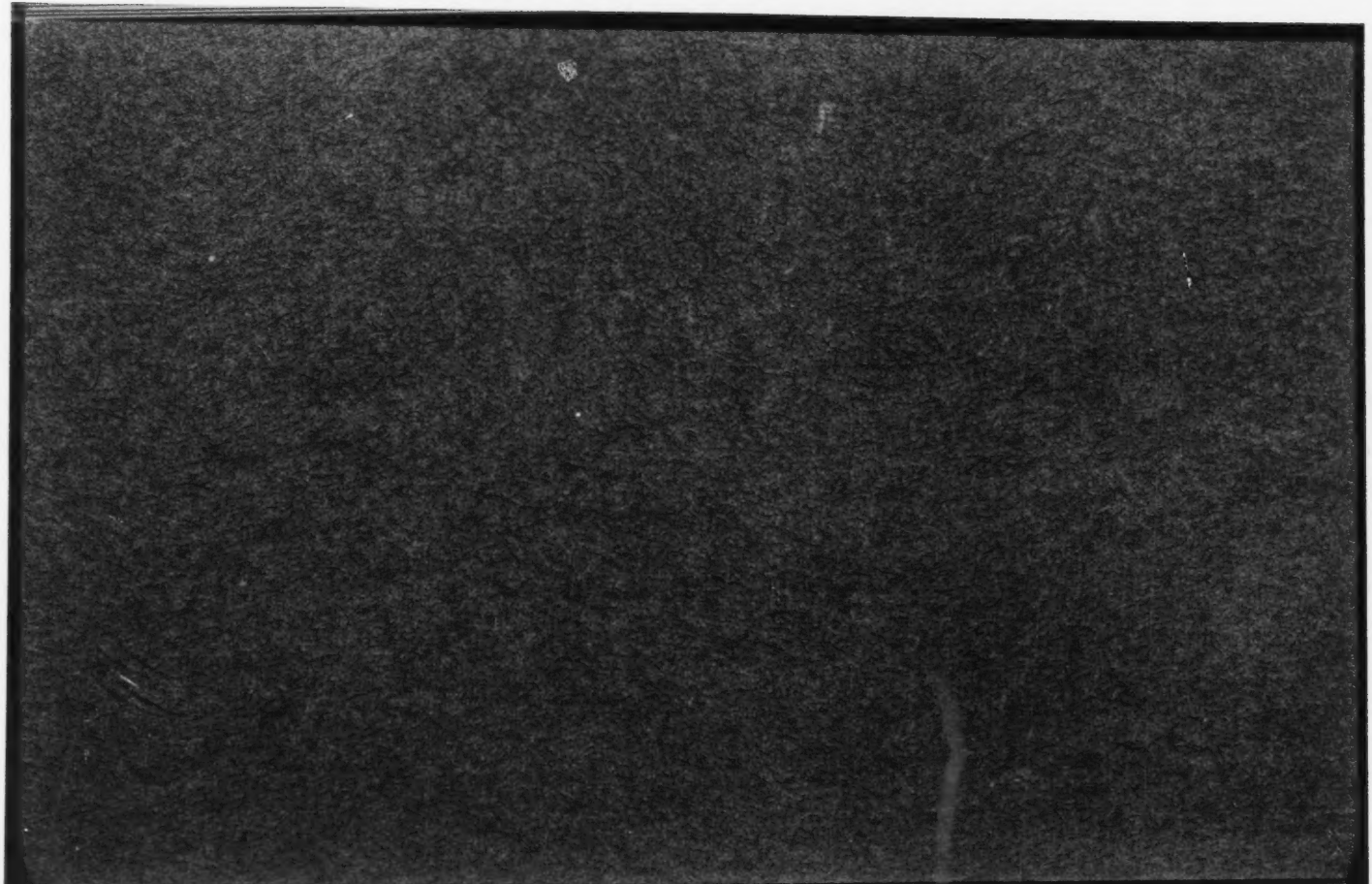

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1056

THE SINGER MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court below (R. IV, 42–57)[1] is not yet reported. The findings of fact, conclu-

[1] Pursuant to stipulation of the parties (R. IV, 60–61), the printed record herein for purposes of the petition for certiorari consists of: (1) "Supplement to Petitioner's brief, Volume I," which will be referred to by the symbol "R. I"; (2) "Supplement to Petitioner's brief, Volume II," which will be referred to by the symbol "R. II"; (3) "Appendix to Respondent's brief," which will be referred to by the symbol "R. III"; and (4) "Supplement to Petitioner's Reply Brief," and the supplemental proceedings before the United States Circuit Court of Appeals for the Seventh Circuit, which will be referred to by the symbol "R. IV."

sions of law, and order of the National Labor Relations Board (R. I, 238–275) are reported in 24 N. L. R. B., No. 41.

JURISDICTION

The decree of the court below (R. IV, 57–58) was entered on April 15, 1941. The petition for a writ of certiorari was filed on May 14, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether an employer's negotiations with a labor organization, found by the Board to have been lacking in good faith, constituted a failure to bargain collectively in violation of Section 8 (1) and (5) of the National Labor Relations Act.

2. Whether, upon such finding, an order requiring the employer to bargain collectively with the labor organization is too vague and indefinite for enforcement.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. I, 238–275). The facts found by the Board

and shown by the evidence may be summarized as follows:[2]

At all times material, a majority of petitioner's employees have been members of United Electrical, Radio and Machine Workers of America, Local No. 917, which is therefore their exclusive bargaining representative (R. I, 242–243; R. I, 164–166). Between June 16, 1938, and April 18, 1939, petitioner and United held twelve fruitless bargaining conferences; although various proposals and counter-proposals were exchanged, the parties at all times remained substantially as far apart as they had been at the beginning (R. I, 244–245; R. II, 339–404). The Board found that petitioner throughout engaged in a mere pretense of bargaining; that it "entertained no desire to reach an agreement with the United, and made no effort in good faith to do so" (R. I, 268, 270). The Board based this finding on an analysis of the negotiations which it considered, for convenience, under the following subject heads:

1. *Paid holidays and vacations.*—Petitioner took the position that these were gratuities to be granted or withdrawn at will, and so, while admitting that it did not contemplate any change in its existing practice with regard thereto, refused to bind itself to continue the practice even in a contract termina-

[2] In the following statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

ble on 30 days' notice; petitioner stated that "to continue [the practice] voluntarily was one thing while to continue [it] under compulsion was another" (R. I, 256–258; R. I, 89–90, II, 325–326, 343, 353, 392–393, 430, 437). The Board found that petitioner thereby "threatened unilateral action so far as these important matters were concerned, in the future" (R. I, 271), and "plainly indicated to the employees that their insistence on bargaining through a union could not secure for them contractual assurance even of the continuance of benefits which [petitioner] was entirely willing to grant the employees individually" (R. I, 270).

2. *Wages.*—Throughout the negotiations lasting almost a year, petitioner insisted upon a 10 percent reduction in wages as a condition of any agreement, even one terminable on 30 days' notice (R. I, 249, 264–265; R. I, 89, II, 338, 341, 351, 360, 490, III, 54). Yet during the entire period of negotiations petitioner made no attempt to put the reduction into effect and declared that its effective date would be determined "later," thereby indicating that the reduction was not then necessary (R. I, 249, 264; R. II, 360). Moreover, petitioner would not bind itself to refrain from further wage reductions during the term of the contract, no matter how short (R. I, 250, 252; R. II, 338, 352, 360, 402–403). Throughout, petitioner offered no evidence to United showing the necessity for the reductions, and United's request for an inspection of petitioner's books or submission of the matter to arbi-

tration was flatly rejected (R. I, 249–250, 252; R. II, 388). The Board found that petitioner "sought to impress upon its employees that in contrast to concessions to be obtained directly by the employees they must expect less favorable wage conditions if they adhered to their demand for a collective agreement" (R. I, 269; R. I, 89, III, 54).

3. *Hours.*—Petitioner, rejecting United's proposal for time and one-half for overtime above the plant's normal 40-hour-week schedule, insisted that United accede to a clause permitting a schedule of hours without overtime compensation far more onerous than that normally prescribed by the Fair Labor Standards Act and which that law, in the absence of such concession by United, forbade (R. I, 252–253, 263–264; R. II, 326, 338, 341–342, 383–384, 390, cf. 52 Stat. 676). All compromises suggested by United were rejected on the grounds of business necessities and a desire to be "free to meet emergencies," even in a contract terminable on 30 days' notice; yet petitioner at no time made an effort to demonstrate to the United that "necessities" or "emergencies" actually required a grant of immunity from the normal operation of the Fair Labor Standards Act (R. I, 253–254, 265; R. I, 141, II, 329, 352, 369–370, 390, 410, III, 54). The Board found that petitioner's "insistence that any collective agreement with the United be a medium through which the respondent would secure an immunity from payment to the employees of overtime rates otherwise required by the Fair La-

bor Standards Act, manifestly was intended to persuade the employees that their membership in the United threatened them with less desirable conditions of employment in this regard than they were otherwise entitled to receive under the law" (R. I, 270).

4. *Seniority.* — After extended negotiations, United agreed to accept a seniority clause proposed by petitioner, provided that it represented, as petitioner asserted, its existing practice (R. I, 255–256; R. II, 367, 386, 422, 431, III, 47). Yet petitioner, though aware of United's doubts concerning the existing practice (R. I, 256, 264, 266; R. III, 28, II, 455–456, 506), did not come forward with evidence to establish the point (R. I, 256, 266; R. II, 437–438). The Board found that petitioner "made no real effort to persuade the United to accept its proposals by communicating to it facts peculiarly within [petitioner's] knowledge" (R. I, 268).

5. *Discrimination, strikes, and lock-outs.*—Petitioner, on patently specious grounds, rejected any clause prohibiting it from discriminating against union members or limiting its right to lock-out the employees; conversely, it insisted upon a comprehensive clause forbidding United to coerce non-union employees and severely limiting its right to strike (R. I, 258–262, 266–267; R. II, 323, 328, 330, 337, 342, 347, 361–362, 376, 381, 405, 407, 442, 449). The Board found that petitioner, for "the purpose of discrediting the United in

the eyes of its members," insisted that United "accept an inferior position by agreeing to a contract which placed restrictions only upon the United, and in the most sweeping terms," and thus denied it "that equality of status which the Act expressly sets forth as * * * an essential basis for collective bargaining" (R. I, 267).

Upon its review of the extended but barren negotiations, the Board found that petitioner had engaged in a mere pretense of bargaining, that it "entertained no desire to reach an agreement with the United, and made no effort in good faith to do so," and that it was its fixed "plan and purpose" to "refuse to agree with the United to grant conditions of employment or make concessions which it was willing to grant the employees directly, and would require the United to accept less desirable conditions of employment than it would grant the employees if they bargained individually, or than they were legally entitled to receive in the absence of a collective agreement. Thus the respondent's hostility to the United would be manifested, membership in the United discouraged and, by pretending to bargain, collective bargaining defeated" (R. I, 268, 270; cf. R. I, 89–90). Accordingly, the Board found that petitioner had refused to bargain collectively in violation of Section 8 (1) and (5) of the Act (R. I, 271–272). The Board found that petitioner had further violated these sections by its refusal to include paid holidays and vacations within the scope of the contract and its

insistence that these were matters to be granted or withdrawn at its will (R. I, 271–272, *supra*, pp. 3–4).

The Board's order required petitioner to cease and desist from its unfair labor practices; to bargain collectively with United; and to post notices (R. I, 274–275).

On November 1, 1940, petitioner filed in the court below a petition to review and set aside the Board's order (R. I, 275–318). The Board answered, requesting enforcement of its order (R. I, 318–321). On March 21, 1941, the court handed down its opinion (R. IV, 42–57), and on April 15, 1941, entered its decree (R. IV, 57–58), enforcing the Board's order.[3]

ARGUMENT

1. Petitioner does not directly challenge the fundamental proposition that the employer's duty to bargain collectively imposed by Section 8 (5) of the Act encompasses the duty to negotiate in good faith with the sincere purpose of arriving at an accord and entering into a binding collective agreement. Sen. Rept. No. 573, 74th Cong., 1st Sess., p. 12; *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, cf. *National Labor Relations*

[3] The cease-and-desist provision of the order cast in the general language of Sections 7 and 8 (1) was modified on request of the Board in conformity with *National Labor Relations Board* v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941.

Board v. *Express Publishing Co.,* No. 442, this Term, decided March 3, 1941; *National Labor Relations Board* v. *Sands Manufacturing Co.,* 306 U. S. 332, 342; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 236.[4] Yet petitioner would devitalize that obligation by contending (Pet. 6, 8–9, 11, 15, 19–28, 31) that once the employer has gone through the motions of bargaining with his employees and has advanced any proposals, regardless of their nature, the Board is precluded from inquiring into the good faith of the purported bargaining. In this view, the preposterous result would follow, for example, that

[4] See also *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 688 (C. C. A. 1); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, decided April 2, 1941 (C. C. A. 1); *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. (2d) 713, 723 (C. C. A. 3); *National Labor Relations Board* v. *George P. Pilling & Son Co.*, decided March 18, 1941 (C. C. A. 3); *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134, 139 (C. C. A. 4), cert. den., 302 U. S. 731; *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 637–638 (C. C. A. 4); *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. (2d) 91, 94 (C. C. A. 5); *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, 478 (C. C. A. 5); *National Labor Relations Board* v. *Sands Manufacturing Co.*, 96 F. (2d) 721, 725 (C. C. A. 6), aff'd 306 U. S. 332; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 22 (C. C. A. 9); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 787 (C. C. A. 9), cert. den., No. 352, this Term; *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. (2d) 473, 480 (C. C. A. 10).

an employer who was paying, and was willing to continue to pay, a wage scale of $1 an hour in absence of an agreement, but who refused to enter into a collective contract unless the rate were reduced to a penny an hour, could not be charged with refusing to bargain collectively. Obviously, if the Board may not go behind the forms of bargaining and ascertain whether the bargaining is sham or *bona fide,* an easy avenue of escape is afforded from the obligations which Congress has prescribed in Section 8 (5) of the Act. The validity of the regulation necessarily extends to an inquiry essential to its practical operation. *National Labor Relations Board* v. *Reed & Prince Mfg. Co.,* decided April 2, 1941 (C. C. A. 1), pending on petition for certiorari, No. 1052, this Term.

Nor is there merit in petitioner's related claim (Pet. 7, 9, 12, 15–16, 19, 27–31) that to permit the Board to make such inquiry is indirectly to compel the employer to make an agreement upon terms prescribed by the Board, and that the decision below is therefore in conflict with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 45, and *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514. Clearly the Board does not prescribe terms, for as long as the employer's conduct is found to be within that broad range consistent with good faith and a sincere effort to reach an agreement, he is entirely free to accept or reject whatever terms he will;

the Board does nothing more than ascertain whether the employer has acted within or without that broad and allowable area. The decision in *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, construing the analogous Railway Labor Act, is dispositive of this issue. There, the Court rejected the carrier's similar contention that "negotiation depends on desires and mental attitudes which are beyond judicial control, and that since equity cannot compel the parties to agree, it will not compel them to take the preliminary steps which may result in agreement" (pp. 549–550), and held that "Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing or enforcing their decrees" (p. 550).[5]

Accordingly the Board's inquiry whether petitioner had bargained in good faith was entirely

[5] Petitioner's further contention (Pet. 7, 9, 12–13, 31–33) that the decision below is in conflict with *National Labor Relations Board* v. *P. Lorillard Co.*, 117 F. (2d) 921 (C. C. A. 6), pending on petition for certiorari, No. 1024, this Term, is likewise without merit. The court in that case upheld the ultimate finding of refusal to bargain collectively, so that the portion of the opinion on which petitioner relies is merely dictum. In any event, the case sets forth no rule contrary to the decision below, for the court recognized that the employer was obligated "to negotiate in good faith" and with "sincerity." The opinion turned on its particular facts which disclosed, in the court's view, "a sincere attempt on the part of respondent to negotiate with the union" (117 F. (2d), at 924).

proper. Its conclusion that petitioner had failed to do so, based upon substantial evidence (Statement, *supra*, pp. 3–7), affords complete support for the ultimate finding of refusal to bargain collectively (R. I, 271–272). Moreover, that finding is independently supported by petitioner's refusal to include paid holidays and vacations within the scope of the contract and its insistence that these were gratuities to be granted or withdrawn at will (R. I, 271–272, *supra*, pp. 3–4).

2. Petitioner's contention (Pet. 6–7, 10–11, 16, 37–40) that the order requiring petitioner to bargain collectively with the United is too vague and indefinite for enforcement, requires little discussion. The order obviously means that petitioner, in contrast to its past conduct, shall bargain with the United in good faith and with a sincere purpose of arriving at an agreement. In *National Labor Relations Board* v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941, the Court said of a precisely similar order that it was "in exact compliance with the statute and should have been left undisturbed by the judgment below." See also *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; cf. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 550.

CONCLUSION

No question worthy of review is presented. The petition for a writ of certiorari should therefore be denied.

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